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In the
SUPREME COURT OF THE UNITED STATES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INC.,

Respondent.

Brief of the States of Missouri, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Dakota, Utah, Vermont, West Virginia and the Commonwealth of the Northern Mariana Islands In Support of Petitioner

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QUESTION PRESENTED

Whether a victim's agreement to arbitrate disputes with another person bars a government law enforcement agency, as plaintiff in an enforcement action against that other person, from obtaining victim-specific monetary remedies such as backpay and damages.

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In Support of Petitioner

INTEREST OF AMICUS CURIAE

The amici are all attorneys general – and thus the chief law enforcement officers – of their respective states and territories. They have varying amounts of authority to prosecute criminal cases. But each of them uses civil tools to enforce a wide range of laws. Among those laws are ones regulating business practices in areas of the economy where mandatory arbitration agreements either are already in

common use, or could easily be used. The Fourth Circuit's holding could permit contracting by private parties to foreclose suits by the amici where the state seeks monetary relief that is measured by losses to victims of illegal acts, even where those victims unknowingly accepted terms buried in fine print, where the money will eventually flow to the victims themselves, rather than remain in state coffers. The amici seek to defend their continued ability to use civil law enforcement actions as a tool to enforce not just civil rights, but consumer protection and other laws that protect the welfare of individual citizens.

SUMMARY OF ARGUMENT

The amici ("attorneys general" herein) work with and often represent state agencies responsible for enforcing civil rights laws that largely parallel the statute under which the Equal Employment Opportunity Commission sought to proceed in this case. Employment, housing, and other transactions to which those civil rights laws apply typically involve written contracts – contracts that could easily include mandatory arbitration clauses. When the attorneys general seek to enforce the civil rights laws, their goal is to ensure that persons and corporations in their states comply with the law generally, not just to address the needs of a single victim. That is true even when the tool the attorneys general use is one that measures the monetary penalty according to individual loss.

The rule adopted by the U.S. Court of Appeals for the Fourth Circuit ignores that goal. It erases the critical distinction between the role of the EEOC, the state civil rights agencies, and the attorneys general on the one hand, and that of private attorneys representing private parties on the other. It concludes that merely because the government calculates monetary payments according to a victim's losses,

its law enforcement efforts are restricted by an arbitration clause entered into by the victim, as to which the government was never a party. Thus an employer or landlord, by forcing individual employees or tenants to individual arbitration, can prevent the government from effectively attacking even a pattern or practice of discrimination.

That alone is enough to argue strongly against affirming the Fourth Circuit's rule. But there is more, for the rule is not limited to the employment context. Nor is it limited to discrimination claims. Rather, it could have an adverse impact on many other law enforcement efforts by the attorneys general.

In particular, the Fourth Circuit's rule could adversely affect efforts by the attorneys general to enforce deceptive practices and other consumer protection statutes. The individual stakes in such cases are often much smaller than those in employment and housing cases. Those smaller stakes are proportionally harder to vindicate through individual actions. Often the purchasers lack the sophistication or means to pursue even arbitration – particularly when it involves large up-front fees or requires hearings at distant locations. Small individual stakes and the buyers' lack of assets or knowledge are typical of the situations in which class actions and consumer protection actions by attorneys general are brought. But a new sort of mandatory arbitration clause is specially designed to preclude class actions – thus leaving the attorneys general as the last bastion of protection for many victims. The Fourth Circuit's rule could severely damage that bastion.

The attorneys general do not suggest that the Court reverse its consistent case law permitting the enforcement of arbitration clauses as to individual plaintiffs. In fact, attorneys general have used arbitration and other forms of

alternative dispute resolution to address many problems, including consumer complaints. But in those instances, the attorneys general or other third-party or government agencies have a key role in defining the scope, availability, cost, and consequences of arbitration. Thus there is an independent check on the process that ensures its fairness to individual consumers. If permitted to cut government law enforcement out of areas of the economy where mandatory arbitration agreements are becoming common, the Fourth Circuit's rule would effectively deprive many deceived consumers of effective redress. And it would have a dramatic impact on the deterrent effect of consumer protection laws.

ARGUMENT

I. The attorneys general cannot be barred, by an arbitration agreement to which the state was not a party, from enforcing state civil rights laws.

States are free to enact fair employment practice legislation,[1] and virtually every state has done so. [2] Their statutes often stretch well beyond the discrimination in employment that is the subject of the Equal Employment Opportunity Commission's jurisdiction, reaching discrimination in housing and other economic sectors.[3] The States' strong local interests in enforcing those anti-discrimination laws[4] are imperiled by the Fourth Circuit's holding.

Most states have established enforcement agencies to investigate charges of discrimination and enforce their laws.[5] Like the EEOC, the state agencies are not merely surrogates for individual victims of discrimination. Rather, they have independent authority to investigate violations of and to enforce laws addressing discrimination – again, not just discrimination in employment – based on disability, race, and other characteristics. For example, the California Director of Fair Employment and Housing may file complaints to enforce California's Fair Employment and Housing Act.[6] The Missouri Commission on Human Rights is empowered "to eliminate and prevent discrimination."[7] The New Jersey Division on Civil Rights "may compel compliance" with, or

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[1] *Colorado Anti-discrimination Comm'n v. Continental Airlines, Inc.*, 372 U.S. 714, 721-22 (1963). *See also DeCanas v. Bica*, 424 U.S. 351, 356 (1976)(states possess broad authority under their police powers to protect workers within their borders).

[2] The States' statutes are identified and described in detail in *Fair Employment Practices Manual* (BNA) 453:1-458:9991.

[3] *See, e.g.*, Alaska Stat. § 18.80.240 (2000); 775 Ill. Comp. Stat. 5/3-102 (1993); Md. Code Ann. Art. 49(B), § 3(c) (2000); Minn. Stat. § 363.03 (2000); Mo. Rev. Stat. § 213.040 (2000).

[4] *See, e.g., Bucyrus-Erie Co. v. The Dep't of Industry, Labor and Human Relations of the State of Wisconsin*, 599 F.2d 205, 207 n.1 (7th Cir. 1979); *Westinghouse Elec. Corp. v. State of Maryland Comm'n on Human Rights*, 520 F.Supp. 539, 542 (D. Md. 1981).

[5] *Fair Employment Practices Manual* (BNA) 451:1 and 451:201 (directory of state and local employment practices agencies).

[6] 2000 Cal. Stat. 12960.

[7] Mo. Rev. Stat. § 213.030(1) (2000).

"prevent violations of" New Jersey's Law Against Discrimination.[8] The South Dakota Commission of Human Rights is empowered to file charges for violations of the state's Human Relations Act.[9] Just as the EEOC represents the federal government's interests, such state agencies represent the interests of the state.[10] In fact, such state agencies never cease to represent the interests of the state, even when proceeding on an individual victim's claim of

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[8] N.J. Stat. Ann. §§10:5-14.1, -14.1a, and -17 (1993).

[9] S.D. Codified Laws § 20-13-29 (1995).

[10] In practice, it is the state or local authority, not the authority retained by the EEOC, that is most often invoked to address employment discrimination claims. In fact, the EEOC must defer initial processing of such claims to a state or local authority where there are comprehensive state laws, the authority has adequate investigatory and enforcement powers, and the authority has applied for deferral status. *Fair Employment Practices Manual* (BNA) 451:2, citing 42 U.S.C. § 2000e-5(c) (1995). State and local authorities that have been so designated account for initial processing of 60% of the job discrimination charges that the EEOC receives. *Id.* at 451:1. And of course, charges may also be filed directly with a state or local authority at the outset. Placing even more responsibility in the hands of state and local authorities, the EEOC may certify a designated authority. Certification means that the EEOC will accept the findings and resolutions of such authorities upon a lower level of review. *Id.* at 451:1. Designated or certified state and local authorities are listed in *Fair Employment Practices Manual* (BNA) 403:19.

discrimination. Representing the state or the public interest is something that private litigants cannot do.[11]

The effect of the Fourth Circuit's holding on state agencies' efforts to enforce their laws is, potentially, no different from its effect on the EEOC. Limiting the ability of the state agencies and the EEOC to pursue monetary relief would negatively impact the ability of those enforcement entities to protect citizens against unlawful discrimination.[12] This Court has recognized that "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."[13] It is the prospect of having to pay back wages that in many cases "'provides the spur or catalyst'" for change in discriminatory employment practices.[14] Most state legislatures recognize that a potential award of back pay is an important facet of their overall plans to eradicate discrimination within their borders, and have given their enforcement authorities the power to award such damages, in addition to injunctive relief.[15]

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[11] *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 458 (6th Cir. 1999)(whenever EEOC sues in its own name, it represents the public interest).

[12] *EEOC v. Frank's Nursery*, 177 F.3d 448 at 466.

[13] *Albemarle Paper v. Moody*, 422 U.S. 405, 417 (1975).

[14] *Id., quoting U.S. v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973) (also describing back pay awards as playing "a crucial role in the remedial process").

[15] *E.g.* Alaska Stat. § 18.80.130(2)(1) (2000); Ariz. Rev. Stat. § 41-1481.G (1992); 2000 Cal. Stat. 12970; Fla. Stat. § 760.11(5) (1997); Minn. Stat. § 363.03 (2000); Mo.

The Fourth Circuit's holding could also hamper the States' and the EEOC's enforcement abilities in an even more fundamental way. In fulfilling their duties to enforce civil and human rights laws, these agencies must, despite their investigatory and subpoena power, depend on individual victims of discrimination not only to cooperate with them at the investigation phase, but to alert them at the complaint filing phase. But individual victims simply may never come forward at all, when faced with the prospect, as here, of binding arbitration where contract clauses place the substantial costs of arbitration in their laps. One circuit judge aptly noted below that such provisions make "[any] accessible forum ... in effect, unavailable, because of the disincentive to arbitrate created by such fees."[16] Under such circumstances, a victim in effect loses all recourse. And an enforcement agency does not, as a practical matter, have the opportunity to learn of the problem and step in, whether to seek damages

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Rev. Stat. § 213.075.11(1) (2000); Ohio Rev. Code § 4112.05(G)(1) (2001); S.D. Codified Laws § 20-13-42 (1995). States vary in whether their statutes also permit the imposition of monetary penalties, and as to the size of those penalties. For example, the cited statutes of Alaska, Arizona, Florida, Minnesota, Missouri, and Ohio do not refer to monetary penalties such as fines, though the California and South Dakota statutes do. *See* 2000 Cal. Stat. 12970 (permitting actual damages and an administrative fine not to exceed $150,000, plus a civil penalty not to exceed $25,000); S.D. Codified Laws § 20-13-47 (1995) (permitting a fine up to $10,000 for willful or repeat violations of Commission orders). Clearly many states do not deem penalties, even with injunctive relief, to be sufficient, standing alone, to deter violations of civil rights laws.

[16] *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 817 n.8 (1999)(King, J., dissenting).

or injunctive relief. Both are critical to agency enforcement efforts.

The Fourth Circuit's holding also glosses over the fact that the EEOC is never a party to a private arbitration agreement. Certainly state enforcement agencies would never be parties, either. Aside from the obvious absurdity of binding third parties such as the EEOC or a state agency with a private contract, especially where a private litigant cannot and does not represent the public interest, this case presents the situation in which the need for government enforcement is particularly acute. Though amici recognize that arbitration, in general, can be an effective tool of dispute resolution, the reality is that pre-dispute employment arbitration agreements are often treated with a healthy dose of skepticism. Some legal scholars oppose such mandatory arbitration.[17] And some states have codified their skepticism by specifically exempting employer-employee pre-dispute arbitration agreements from enforcement.[18] This Court's decision in *Circuit City Stores*

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[17] *See, e.g.*, Katherine Eddy, *To Every Remedy a Wrong: The Confounding of Civil Liberties Through Mandatory Arbitration Clauses in Employment Contracts*, 52 HASTINGS L.J. 771 (2001); Victoria J. Crane, *The Mandatory Arbitration Clause: Forum Selection or Employee Coercion?*, 8 B.U. PUB. INT. L. J. 537 (1999); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (Winter 1998); and Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

[18] *E.g.* Ark. Stat. Ann. 16-108-201 (Supp. 1999); Conn. Gen. Stat. § 46a-85 (2001); Iowa Code 679A.1 (2001); and Kan. Stat. Ann. 5-401 (1999).

v. Adams[19] that the Federal Arbitration Act applies to employment contracts does not ameliorate that skepticism. Appropriately, it makes no judgment as to the value of arbitration in such contracts.

The skepticism over employer-mandated arbitration in the context of a civil rights claim is based, in part, on the apparent limitations of the arbitration forum. While specialized agencies such as the EEOC and the States' enforcement agencies have developed and apply expertise in the area of discrimination, arbitrators need have no such expertise.[20] Nor are they required to follow case law – which may lead to "particularly unpredictable" results.[21] Despite that unpredictability, there are trends – and they are troubling. While "[p]laintiffs are estimated to win nearly 70% of the 25,000 wrongful discharge and discrimination cases filed in state and federal courts nationwide,"[22] the same is not true in arbitration. A study demonstrated that an employer who is arbitrating for the first time is as likely to lose in arbitration as in court.[23] But where the employer is a "repeat player" (has arbitrated before), that risk drops dramatically – to

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[19] 121 S.Ct. 1302 (2001).

[20] *See Department of Fair Employment and Housing v. American Airlines, Inc.*, 1991 CAFEHC LEXIS 18, *37-39 (Ca. Fair Emp. & Housing Comm'n March 7, 1991).

[21] Eddy, *supra* n. 17, at 777.

[22] *Id.*

[23] Bingham, *supra* n. 17, at 234 (employers arbitrating for the first time are likely to lose 70% of the time).

16%.[24] The amount that employees recover where their employers are repeat players is also statistically less than in cases involving employers arbitrating for the first time.[25] These statistics may explain why "the number of companies choosing to require mandatory arbitration of employee disputes is on the rise."[26] And they explain why the States need to preserve the ability to themselves address discrimination – particularly systematic discrimination – despite mandatory arbitration clauses to which they obviously were not parties.

When enforcing their anti-discrimination laws, the states are vindicating not just the federal policy before the Fourth Circuit, but their own policies. The Fourth Circuit did not, of course, address those state policies in the context of the purely federal claim before it. But unless this Court reverses or limits the Fourth Circuit's holding, it could become an effective shield against enforcement of the States' policies. As a matter of logic, the Fourth Circuit's holding, grounded as it purports to be in "the competing federal policy favoring the enforcement of arbitration agreements" and striking a "balance" between federal anti-discrimination and pro-arbitration policies,[27] should not extend beyond federal law. While this Court has said that the Federal Arbitration Act "pre-empts those state employment laws which restrict or limit the ability of employees and employers to enter into

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[24] *Id.*

[25] *Id.*

[26] Eddy, *supra* n. 17, at 777.

[27] 193 F.3d at 812.

arbitration agreements,"[28] it did so only in the context of private disputes in which the rights of the individual plaintiffs who had agreed to arbitrate were at stake, not in the context of state (or federal) agencies protecting public policy and the public interest. No decision of this Court limits the power of state agencies acting in the public interest to enforce state law.

States that choose to enact anti-discrimination or other laws regulating employment should be free to strike their own balances, by statute or through the common law. That freedom is threatened in this case. The Fourth Circuit's majority "relie[d] on its own assumptions about corporate practices, as if those are somehow dispositive of the question whether an agreement to arbitrate has been formed."[29] Courts applying that holding might improperly rely on assumptions about state law. That would wrongly curtail powers left to the States under our federalist system. Accordingly, even if this Court were to uphold the Fourth Circuit's ruling as an interpretation of *federal* anti-discrimination law, it should clarify that the states, including those whose laws against discrimination are enforced by amici, remain free to strike a different balance and to permit state agencies to enforce state law.

II. The attorneys general cannot be barred, by an arbitration agreement to which the state was not a party, from enforcing consumer protection laws.

Although this case arises from the use of an arbitration clause in an employment agreement, the Fourth Circuit's rule is not, by express limitation or by its rationale, restricted to

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[28] *Circuit City*, 121 S. Ct. at 1312.

[29] 193 F.3d at 817 (King, J., dissenting).

that context. Nor is it limited to the context of the civil rights laws. Indeed, the Fourth Circuit's rule may affect *any* action where the underlying transaction involves an arbitration clause. Thus it threatens a wide range of actions in which attorneys general would otherwise seek to enforce the law by using restitution or damages as tools. Attorneys general use those actions to attack practices that result in small individual, but large collective losses. In those instances, the attorneys general act where individual claimants may lack the economic means or the economic incentive to act. The actions of the attorneys general, much like class actions brought by private counsel, are intended in part to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[30] But again, they are also intended to enforce the law generally – to create a deterrent against fraud, deceit, discrimination, and other ills.

Though such actions may be brought in a wide variety of contexts, attorneys general have been particularly active in the area of consumer protection. "As of 1977, 48 states plus Puerto Rico and Guam had enacted consumer protection laws."[31] Many of them are "little FTC Acts," "meant to complement the deceptive practices jurisdiction of the [Federal Trade Commission]."[32] Such laws are "modeled

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[30] *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997), *quoted with approval*, *Amchem Prods. v. Windsor*, 521 U.S. 591, 616 (1997).

[31] *Purity Supreme, Inc. v. AG*, 380 Mass. 762, 407 N.E. 2d 297, 304 n. 11 (Mass. 1980).

[32] *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 973 P.2d 527, 551 n. 2, 83 Cal.Reptr.2d 548 (Cal. 1999) (Kennard, J.

after the Federal Trade Commission Act, which prohibits 'unfair and deceptive acts and practices.'"[33] In most states, the laws are enforced by the attorney general.[34] When an attorney general files an action under such an act – even if the action seeks restitution, as it often does – the suit "is essentially a law enforcement action designed to protect the public, not to benefit private parties."[35]

The attorneys general have used consumer protection laws to attack deceptive and unfair practices in a wide variety of industries. For example, attorneys general have obtained relief against health insurance companies that permitted providers to charge co-pays based on a theoretical "full price" rather than the price actually negotiated with the insurer, and against cellular telephone companies that round up to the next minute even after one second without adequately notifying customers. They have initiated investigations and filed actions to address a wide variety of complaints in long distance telephone service, most prominently carriers that switch residential customers to their systems, sometimes with high initial and switching fees and usually with higher rates, based on deceptive documents – colloquially called "slamming." Many of the actions taken by the attorneys general are prompted by consumer complaints. The pattern of such complaints highlights the potential for mischief presented by the Fourth Circuit's rule. As a sample, during

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dissenting).

[33] *State ex rel. Nixon v. Telco Directory Publishing*, 863 S.W.2d 596, 601 (Mo. banc 1993).

[34] *Purity Supreme*, 407 N.E. 2d at 304 n. 11.

[35] *People v. Lann*, 225 Ill.App.3d 236, 587 N.E. 2d 521, 524 (Ill. App. 1992).

March 2001, the Missouri Attorney General's Consumer Complaint Unit logged 2074 complaints – most of them in areas such as time shares, consumer finance and credit, telephone service, and automobile sales. In all of these and many areas of concern to the attorneys general, there are written notices and agreements into which a mandatory arbitration clause could be inserted.

To date, the effect of mandatory arbitration clauses in these and other areas addressed by the attorneys general has been very limited. But a collision between those clauses and the States' law enforcement efforts is inevitable. This Court has confirmed the enforceability of arbitration agreements in a wide variety of contexts.[36] Businesses are building on that foundation, rapidly expanding their use of such agreements into new areas of our economy. Unfortunately, the economic incentives that encourage that trend sometimes encourage the use of techniques designed to take advantage of consumers and others who lack the economic incentive to pursue their claims when faced with the burdens of, and sometimes offered only limited benefits by, arbitration.[37] In some industries, consumers who manage to read the fine print, understand it, and persevere to seek out an alternative supplier can avoid such techniques by choosing a supplier that does not insist on arbitration, or at least one that offers a

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[36] *E.g.*, *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000); *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[37] *See* Jean R. Sternlight, *Panacea of Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637, 680-86 (1996).

consumer-friendly arbitration process. But choices may be limited in some industries.

Consumers have no choice whether to use arbitration when an entire industry uses arbitration clauses. And the use of industry-wide arbitration is neither new nor unusual. "For over a hundred years, so-called self-regulatory organizations ... such as the New York Stock Exchange have established arbitration programs for resolution of consumer claims against brokerages."[38] This Court has upheld decisions compelling arbitration under such programs.[39] More recently, mandatory arbitration has become nearly universal in other fields. Thus today it is standard to find, buried in the small print of the rules included in credit card solicitations, a clause requiring arbitration of disputes with the card provider. Similar clauses are inserted, with little notice, into the rules covering existing credit card accounts. Some companies have gone so far as to add a purportedly retroactive clause *after* a class action against the company has been filed but before the class is certified, in a transparent attempt to prevent participation in the class.[40] That expansion has not generally been successful.

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[38] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 45 n. 169 (Oct. 2000).

[39] *E.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

[40] *See, e.g., Marsh v. First USA Bank,* NA, 103 F. Supp. 2d 909 (N.D. Tex. 2000); *Carnegie v. H&R Block, Inc.*, 687 N.Y.S.2d 528 (N.Y. Sup. Ct. 1999); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999); *Bodie v. Bank of America*, 67 Cal.App.4th 779, 79 Cal. Rptr. 2d 273 (Cal. App. 1st Dist. 1998).

But it demonstrates the lengths to which some companies will stretch an industry's penchant for arbitration.

Though in most industries arbitration is not yet pervasive, it is present and rapidly becoming common in a wide variety of consumer transactions. Among the recent reported cases involving such clauses are ones involving insurance,[41] automobile sales,[42] franchises,[43] consumer loans,[44] and cellular telephone phone service.[45] The clauses are showing up in form contracts used in a variety of transactions

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[41] *Appleton Papers, Inc. v. The Home Indemnity Co.*, 235 Wis.2d 39, 612 N.W. 2d 760 (Wis. App. 2000); *Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc.*, 752 So. 2d 55 (Fla. 2000); *Fireman's Fund Ins. v. Bugailisluis*, 278 Ill.App.3d 19, 662 N.E. 2d 555 (Ill. App. 1996); *Graham v. State Farm Mutual Automobile Ins. Co.*, 565 A.2d 908, 912 (Del. 1989).

[42] *Capitol Chevrolet & Imports v. Granthan*, 2000 Ala. LEXIS 490 (2000); *Lozada v. Dale Baker Oldsmobile*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000); *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998).

[43] *Bishop v. We Care Hair Development Corp.*, 316 Ill.App.3d 1182, 738 N.E. 2d 610 (Ill. App. 2000); *We Care Hair Development Corp. v. Engen*, 180 F.3d 838 (7th Cir. 1999); *KKW Enterprises v. Gloria Jean's Gourmet Coffees*, 184 F.3d 42 (1st Cir. 1999).

[44] *Johnson v. West Suburban Bank*; 225 F.3d 366 (3d Cir. 2000); *American General Finance v. Branch*, 2001 Ala. LEXIS 78 (2001).

[45] *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. App. 1999).

involving consumers, such as real estate purchases.[46] They are being used to regulate the ability of patients to pursue complaints about health insurance,[47] physicians,[48] managed care organizations,[49] and nursing homes.[50] And they now appear in many of the parts of the economy where attorney generals have found consistent patterns of deceptive practices being used on relatively unsophisticated and economically

[46] *Johnson v. Siegel*, 84 Cal. App. 4th 1087, 101 Cal. Rptr 2d 412 (Cal. App. 6th Dist. 2000).

[47] *United Benefit Life Ins. Co. v. Collins*, 2001 WL 273902 (N.D. Ala. 2001).

[48] *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013 (Ariz. 1992); *Obstetrics & Gynecologists William G. Wixted, et al., v. Pepper*, 101 Nev. 105, 693 P.2d 1259 (Nev. 1985).

[49] *In re Managed Care Litigation*, 132 F. Supp. 2d 989 (S.D. Fla. 2000); *Broughton v. Cigna Healthplans of Calif.*, 21 Cal.4th 1066, 988 P.2d 67, 90 Cal.Reptr. 334 (Cal. 1999); *Erickson v. Aetna Health Plans of Calif.*, 71 Cal. App. 4th 646, 84 Cal.Reptr. 76 (Cal. App. 4th Dist. 1999).

[50] *Condee v. Longwood Management Corp.*, 88 Cal.App.4th 215, 105 Cal. Rptr. 2d 597 (Cal. App. 4th Dist. 2001).

disadvantaged consumers, such as home repairs,[51] mobile home sales,[52] and "pay day" loans.[53]

The move toward mandatory arbitration clauses has been accelerated by the arrival of "e-commerce." The purchase of goods and services on the Internet involves written agreements and long distance relationships that lend themselves to the imposition of mandatory contractual terms. The clauses are accessible only through multiple "links" or "clicks," and even then only by scrolling through lengthy "terms and conditions" pages. For example, the most popular Internet auction site, "eBay," includes a clause seventeen paragraphs into its "User Agreement" that requires its customers to use arbitration – and provides that the arbitration take place in San Jose, California, that it cannot be consolidated with other arbitrations, and that it conform to rules that can impose considerable costs on the person seeking arbitration:

> Any legal controversy or legal claim arising out of or relating to this Agreement or our services, excluding legal action taken by eBay to collect our fees and/or recover damages for, or obtain an injunction relating to, the eBay site operations, intellectual property, and our

[51] *Williams v. Aetna Finance Co.*, 88 Ohio St. 3d 464, 700 N.E. 2d 859 (Ohio 1998).

[52] *Oakwood Acceptance Corp. v. Hobbs*, 2001 Ala. LEXIS 4 (2001); *Johnnie's Homes, Inc. v. Holt*, 2001 Ala. LEXIS 8 (2001); *Dobbins v. Hawk's Enterprises*, 198 F. 3d 715 (8th Cir. 1999).

[53] *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E. 2d 854 (W. Va. 1998).

> services, shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. Any such controversy or claim shall be arbitrated on an individual basis, and shall not be consolidated in any arbitration with any claim or controversy of any other party. The arbitration shall be conducted in San Jose, California, and judgment on the arbitration award may be entered into any court having jurisdiction thereof. . . .[54]

Such terms inhibit the ability of consumers in distant states and territories to enforce their rights – especially when the dispute involves small dollar amounts.

The impact of mandatory arbitration clauses is further exacerbated by changing demographics. The 1990 Census showed that nearly 6 million U.S. residents lived in households that were "linguistically isolated," *i.e.*, there was

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[54] The eBay "User Agreement" is available at http://pages.ebay.com/help/community/png-user.html (visited May 24, 2001). The "commercial arbitration rules of the American Arbitration Association" (AAA) referred to in the eBay agreement include filing fees starting at $500 on claims below $10,000, though the fee might be waived in some undefined set of circumstances. Effective March 15, 2001, the AAA has set out a separate set of "Arbitration Rules for the Resolution of Consumer-Related Disputes," which provides for an initial $125 fee for consideration of a paper record and an additional $100 for a telephone hearing, but refer the consumer back to the commercial rules for an in-person hearing. The AAA rules and fee schedules are available at http://www.adr.org/ under "Focus areas: Commercial" (visited May 24, 2001).

no resident over age 14 who spoke English well.[55] Though the language data for the 2000 Census has not been released, if it tracks the dramatic increases in the number of Hispanic and Asian residents, the number of "linguistically isolated" households will have risen to more than nine million.[56] The language problems of those making purchasing decisions in those households makes their residents more likely to unknowingly agree to mandatory arbitration. And for them, the arbitration process is particularly difficult, for the rules of the major arbitration groups lack any promise of translation assistance.

If the Fourth Circuit's rule is upheld, the increased use of mandatory arbitration agreements may severely and adversely impact the effectiveness of efforts of attorneys general to protect consumers at all income levels and with all degrees of English proficiency. Yet the attorneys general may already be the last bastion of protection where numerous consumers have small claims but lack the economic power to vindicate their rights and force changes in behavior. Though class actions have often shared that role, the arbitration industry has discovered and actively promoted methods of preventing consumers and others from pursuing relief as a

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[55] U.S. Census Bureau, Table 3. Language Use and English Ability, Persons 18 Years and Over, by State: 1990 Census, available at http://www.census.gov/population/-socdemo/language/table3.txt (visited May 24, 2001).

[56] In the 1990 Census, 29,627,721 residents listed Hispanic or Asian as their race; in the 2000 Census, the total was 45,548,807. For further discussion of the increase in Hispanic population, see Betsy Guzmán, *The Hispanic Population* (U.S. Census 2000 Brief Series, May 2001), available at http://www.census.gov/prod/2001pubs/-c2kbr01-3.pdf (visited April 30, 2001).

class.[57] Companies using mandatory arbitration seek to prevent class actions because they "know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable."[58] Thus they have increasingly used express bars on class relief.[59] Those bars follow the pattern shown in the eBay User Agreement: They prohibit an individual claim in arbitration from being "consolidated in any arbitration with any claim or controversy of any other party."[60] That strategy, "[i]f successful, . . . would permit any company that has an ongoing relationship with a potential plaintiff–such as an insurer, manufacturer, cruise ship or HMO–to use a contract of adhesion to require that person, typically unknowingly, to arbitrate rather than litigate, and to explicitly bar that person from proceeding by way of class action."[61]

The anti-class-action arbitration strategy has been subject to attack by plaintiffs and their lawyers. But companies defending such provisions have themselves brought the issue back to the point that so concerns the amici attorneys general. When faced with plaintiffs' claim that eliminating class actions blows a huge hole into enforcement of consumer protection laws, such companies have pointed in

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[57] *See* Sternlight, *supra* note 38, at 5 n. 2.

[58] Sternlight, *supra* note 38, at 9.

[59] *See* Sternlight, *supra* note 38, at 6.

[60] e-Bay User Agreement, *supra* note 54.

[61] Sternlight, *supra* note 38, at 10-11 (footnotes omitted).

defense directly to enforcement by government agencies.[62] Recently the U.S. Court of Appeals for the Third Circuit, upholding an agreement barring class actions in *Johnson v. West Suburban Bank*,[63] accepted that argument. It pointed to the continued existence of "administrative enforcement mechanisms" to rebut a claim that to bar class actions would severely undermine the effectiveness of the Truth in Lending Act.[64] But that argument is premised on the continued ability of the government to pursue those who engage in fraudulent or deceptive practices. And again, that ability is threatened by the Fourth Circuit's rule.

The attorneys general recognize that the Fourth Circuit's rule permits the use of penalties and injunctive relief – as the Third Circuit pointed out in the context of federal law enforcement in *West Suburban Bank*.[65] But at least as applied to state consumer protection laws, the Third Circuit's analysis is problematic. It presupposes – falsely – that there is a practical alternative for the victims. It presupposes – again, falsely – either that the government's interest is solely to enforce the law prospectively, or that enforcement limited to the future is an effective deterrent to misbehavior today.

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[62] *E.g.*, Brief of The Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners, *Green Tree Financial Corp. v. Randolph*, No. 99-1235, 1999 U.S. Briefs LEXIS 1235, *22 (Federal Trade Commission's restitution authority can be used to protect consumer rights under the Truth in Lending Act even where there are arbitration agreements).

[63] 225 F.3d 366 (3d Cir. 2000).

[64] *Id.* at 375.

[65] *Id.*

And it forces the curious conclusion that the public is better off – and that Congress and the state legislatures intended to leave them – with penalties flowing into the public treasury than with restitution flowing to those suffering actual loss. [66] There is nothing in the Third Circuit's opinion, or in any decision cited by that court, to explain such a conclusion.

Moreover, the Third Circuit's analysis is in the context of banking, a closely supervised industry where there are frequent opportunities for federal agencies to observe and attack violations of the law. The state consumer protection laws have a much broader range, and are most often enforced by the attorneys general outside the regulated industry context. As to the consumer protection laws, it is critical to recognize that it may be possible to insert a mandatory arbitration clause in virtually every consumer transaction with written documents, either paper or electronic. Thus the Fourth Circuit's rule might ultimately permit those selling goods ranging from time shares to used automobiles, services ranging from long distance telephone service to driveway resurfacing, and even those engaged in pyramid schemes to point to arbitration clauses and proclaim immunity from actions by the attorneys general that reach nefarious past acts. That would be true even though the attorneys general appear as plaintiffs, seeking to enforce the law.[67]

Even when an attorney general appears as a plaintiff, vindicating the public interest and enforcing state law, the recovery may be measured in terms of consumer loss. The

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[66] The Third Circuit's analysis does not address, of course, instances in which penalties are not available. *See* note 15, *supra*.

[67] *See, e.g., In the Matter of Towers*, 162 F.3d 952, 956 (7th Cir. 1998).

funds recovered may even flow, directly or indirectly, to consumers. But neither the measurement nor the identity of the ultimate recipient changes the fact that suits brought under consumer protection statutes are law enforcement actions, intended to eliminate the incentive to deceive by ensuring the disgorgement of ill-gotten profits. This Court should prevent the Fourth Circuit (and other state and federal courts that might follow its rule) from forcing the law and the States down a road that leads, as a practical matter, to a place where unnumbered consumers who have been deceived, but who lack the ability to pursue or have lost sums too small to justify even the costs of individual arbitrations, are left without effective protection. Arbitration certainly has an important role even in consumer law. But it should not be handed to the unscrupulous as a shield from government efforts to attack consumer deception after the fact.

CONCLUSION

Because of the threat it poses to the effective enforcement by the States of their civil rights, consumer, and other laws, the Court should reverse or limit the Fourth Circuit's holding and affirm the ability of the States to enforce their laws even when the tool they use measures relief and ultimately results in payments to victims who signed contracts that included mandatory arbitration clauses.

Respectfully submitted,

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